COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Barnstable, ss. No. SJ2018-0302

COMMONWEALTH OF MASSACHUSETTS
Petitioner

v.

EMORY G. SNELL, JR.,
Defendant – Respondent

DEFENDANT'S PRO SE MOTION FOR LEAVE TO OPPOSE COMMONWEALTH'S EMERGENCY STAY PURSUANT TO C. 211, §3 AND REQUEST FOR C.231 A, §1 DECLARATORY JUDGMENT.

Defendant, Emory G. Snell, Jr, an unconstitutionally imprisoned actual innocent for the past 23 years, arising specifically from the Barnstable prosecutor's intentional sub-rosa withholding of BRADY / TUCCERI disclosure responsibilities, hereby moves this Honorable Court to grant Defendant's pro-se MOFFETT-styled motion. In furtherance hereto, the following facts and precedent are cited.

INTRODUCTION

Defendant agrees with Attorney Shea's reciting of fact with the caveat being:

1. On May 2, 1995, Prosecutor O'Keefe, and Defense Counsel Albert C. Bielitz signed a pre-trial Discovery Agreement for inter-ala police reports and autopsy reports;

2. Defense Counsel Bielitz (P#10) sought by motion the hospital records of Elizabeth Snell;
3. Bielitz additionally motioned (P#13) Motion to Inspect Scientific Physical Evidence;
4. Bielitz also sought (P#14) Scientific Expert Witnesses, and finally;
5. Bielitz requested (P#15) Intra / Inter-Departmental Police Reports and Records.

Docket entries from original 1995 Court Proceedings. See Exhibit A.

Prosecutor O'Keefe refused to comply to convey to the defense the aforesaid BRADY / TUCCERI motions. Bielitz by way of motions to compel (P#34, P#37, P#47) id., denied the Defendant a fundamentally fair trial and due process of law by withholding material exculpatory scientific evidence.

In 2005, Defendant represented by privately retained Counsellor at Law Irving Marmer, presented Barnstable Superior Court Justice Richard Connon with a written motion for post-conviction (OCME) discovery. On December 16, 2005, Judge Connon, presumably under the prima facie standard of Rule 30(c)(4) post-conviction discovery, granted the Defendant complete and total access to the Office of the Chief Medical Examiner's 1995 autopsy materials compiled by Dr. William Zane. See Exhibit B. Prior to Judge Connon's 2005 Order, Defendant had no knowledge of the Prosecutor's sub-rosa withheld exculpatory scientific material, which unassailably demonstrated that Dr. Zane's autopsy was incompetent and fatally flawed, where the real cause of death by a reasonable medical certainty has been determined to be a "natural fatal cardiac arrhythmia". See Exhibit C, affidavit/report of Dr. Baden, MD. The importance of Judge

Connon's 2005 post-discovery Order undeniably demonstrates that since 2012 the prosecutor has perpetrated a fraud on the Court by its repeated arguments of "waiver."

Due particularly to the 1995 sub-rosa suppression of pre-trial requested scientific discovery by the prosecutor, and despite Defendant's due diligence, that BRADY evidence discovered AFTER 2005 could not be known for two prior Rule 30's, neither presenting any scientific evidence newly discovered.

ISSUES PRESENTED

Whether the prosecutor should benefit from sub-rosa withholding from BRADY / TUCCERI scientific exculpatory material evidence pre-trial (1995) requested discovery by a fraud on the Court, and further through an emergency stay for the only purpose of judge-shopping a jurist who is prosecutor-friendly due to the impending mandatory retirement of Judge Muse on August 16, 2018 after presiding over this case for 7 years. On the evidence, the purposeful withholding of the exculpatory evidence, as well as the timing and scope of OCME Zane's complete and total incompetence was hidden intentionally to deprive Defendant 6th Amendment compulsory and confrontation clause guarantees. See Exhibit D, former OCME Chief of Staff Dr. Stanton Kessler's 3/7/2011 report detailing same. The intentional misleading of Defense counsel about that evidence and the continuing fraud on the Court in order to hide the scope of Zane's incompetence demands a full review and consideration for not only dismissing the Emergency Stay, but also the indictment in its entirety.

Whereas the issue in its entirety is properly presented as: Defendant who has suffered a grave miscarriage of injustice by the 23 years loss of liberty requests as a remedy that this Court,

by way of its inherent powers, correct the injustice, restore integrity to the justice system, and prevent future Barnstable prosecutorial misconduct by dismissal with prejudice of his conviction tainted by the prosecutor's intentional sub-rosa suppression misconduct and Order the prosecutor to comply with all ethical BRADY / TUCCERI obligations regarding disclosure of all exculpatory material evidence.

ARGUMENT

The Defendant, 23 years ago, was rushed to justice by indictment and subsequent conviction in **125 days**. Despite obligatory BRADY / TUCCERI-styled discovery of material exculpatory scientific evidence, the 3 motions to compel, and the prosecutor's well-recognized continuing responsibility of discovery, none of that requested scientific evidence was conveyed to the defense. Defendant exercised due diligence to seek these sub-rosa exculpatory materials, but the prosecutor's misconduct and misrepresentations did not produce any exculpatory evidence pre-trial. This Court must reasonably conclude that the deliberate misconduct was so egregious that presumptive prejudice is suffered by the Defendant and that the only remedy would be dismissal with prejudice. See COMMONWEALTH v. TUCCERI, 412 Mass. 401, 408 (1992); COMMONWEALTH v. COTTO, SJC-11761; COMMONWEALTH v. WARE, SJC-11709 (Prosecutor by its non-disclosures and continuing inaction to correct its false prior statements).

Defendant further advances that the prosecutorial misconduct in failing to disclose Dr. Zane's gross ineptness; failure to obey OCME administrative orders; and failure to bring the suspected close-contact homicide autopsy to the Boston OCME's highly technological facility

unmistakably undermines the confidence in the verdict; as recently demonstrated by state laboratory technicians Annie Dookhan, and Sonja Farak.

The deliberate misrepresentation to the grand jury, petit jury, and Superior and Supreme Judicial Courts during Defendant's trial and direct appeal constituted a fraud on the Court that on its own, requires dismissal with prejudice. The prosecutor's then and continuing misconduct, in sub-rosa state suppression, arises to the level of a BRADY / TUCCERI violation. Indeed, as this Court did for the Hinton scandal, an exercise of its superintendent power should now be performed to reverse the substantial miscarriage of justice. See COMMONWEALTH v. SCOTT 467 Mass. 366, 352 (2014). In fact, such exercise would be an efficient administration of justice by a prompt remedy for the Defendant, who is unconstitutionally imprisoned for natural life.

I. This Court Should Vacate And Dismiss With Prejudice The Defendant's Wrongful Conviction.

The instant matter, expressly details the prosecutor's (1) deliberately blocked both pre- and post-conviction rights of the Defendant by committing a fraud on the court and by failing to disclose the sub-rosa intentionally withheld BRADY / TUCCERI scientific evidence; and (2) through such prosecutorial misconduct, caused the Defendant irreparable prejudice.

A. The Prosecutor's Misconduct Warrants Dismissal With Prejudice.

In this case, dismissal with prejudice is "a remedy of last resort" that is warranted when prosecutors' egregious misconduct is "deliberate and intentional, or results in a violation of constitutional rights." See COMMONWEALTH v.

CRONK, 396 Mass. 194, 198-199 (1985). At bar, the Court through well-established authority may act to dismiss a case upon a finding of fraud on the Court. See ROCKDALE MGMT. CO. v. SHAWMUT BANK, 418 Mass. 596, 598-599 (1994). Here the prosecutor, in concert with OCME Zane, engaged in egregious misconduct, made misrepresentations to the grand jury, petit jury, and the Superior and Supreme Judicial Courts, which resulted in a clear violation of constitutional rights of the Defendant, including his right to exculpatory evidence and a fair trial. Therefore, the Defendant requests as a deterrent against the prosecutor and other agencies involved in the investigation from withholding discovery through ignoring their duty, that dismissal with prejudice is the only remedy.

According, as in this case, where the Defendant has clearly demonstrated that the prosecutorial misconduct is deliberate, the facts of prejudice assume "paramount importance" CRONK, 396 Mass. At 199, because "deliberate undermining of unconstitutional rights must be countenanced," COMMONWEALTH v. MANNING 373 Mass. 438, 444 (1977); COMMONWEALTH v. LIGHT, 391 Mass. 112, 116 (1985) ("Explaining that in MANNING, the purpose of dismissing the criminal case with prejudice, was "to discourage government agents from such deliberate and insidious attempts to subvert the Defendant's right to a fair trial"). Prophylactic considerations are particularly required when a prosecutor turns a Court into an unwitting instrument of injustice:

> [O]nly when the importunings of government agents are unsuccessful will the matter come to the attention of the Courts, and there is, in turn, a grave danger that the Courts themselves may

> become the instrumentality to which government may effectuate [violations of] constitutional rights.

MANNING, 373 Mass. At 444.

See LIGHT 394 Mass. at 117 (Recognizing that in extreme cases sending a defendant back to begin all over again would be neither be just nor equitable). The Commonwealth cannot be excused with the proverbial slap-on-the-wrist, nor should it be given a do-over. Indeed, this is not a matter simply of inept and bungling by the prosecution team. COMMONWEALTH v. LAM HUE TO, 391 Mass. 301, 311 (1984). Certainly, the prosecutor / Zane did not only engage in tactics that are ill advised or unethical, COMMONWEALTH v. JACKSON, 391 Mass. 749, 754-755 (1984); it committed a fraud on the Court to conceal Zane's outrageous misconduct, preserve the finality of the wrongful conviction, and prevent the vindication of Defendant's constitutional rights. COMMONWEALTH v. LEWIN, 405 Mass. 566, 587 (1989).

The prosecutor's / Zane's misconduct in this case is particularly a deliberate deception which this Court needs to condemn as reprehensible. It violated the due process rights of the Defendant, it deliberately blocked Defendant's [pre-trial] rights, post-conviction rights, and more broadly undercut "the constitutional rights of us all by undermining the integrity of our system of constitutional rights and by making a mockery of [the prosecutor's] oaths to tell the truth." LEWIN, 405 Mass. At 586. As Chief Justice Liacos warned in LEWIN, if this Court "ignores the realities of a fair trial, recites indignant but toothless rhetoric about prosecutorial misconduct, yet withholds the ultimate sanction of dismissal with prejudice, this

Court fails to discourage governments from such deliberate and insidious attempts to subvert the defendant's right to a fair trial." id. at 588-589.

The Commonwealth's inexcusable and/or intentional neglect of its discovery obligation and the subsequent prosecutor/Zane misconduct warrants this Court's strongest response. In the specific context of Zane's pathology ineptness, caselaw is well established that this Court has ruled that the government bears the burden of taking reasonable steps to remedy that misconduct. Those reasonable steps include the obligation to timely and effectively notify the Defendant of Zane's egregious misconduct affecting the Defendant's criminal case. See COMMONWEALTH v. WARE, 471 Mass. 85, 95, (2015). (Holding the Commonwealth has the duty to disclose the exculpatory evidence held by the prosecution's team); PETITION OF WILLIAMS, 378 Mass. 623, 625 (1979) (Recognizing that deliberate blocking violates due process); COMMONWEALTH v. LEE, 394 Mass. 209, 221 (1985) (Explaining that deliberate blocking entails intentional or deliberate misconduct by the prosecutor). Also in COMMONWEALTH v. SWENSON, 368 Mass. 268, 279-280 (1975) (Discussing prosecutor's duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution's team).

B. The Court Has The Inherent Power At Any Time To Dismiss The Indictment For Fraud On The Court.

This is an exceptional case where the Court should exercise its inherent power to dismiss, both to protect the integrity of the process and send the

appropriate message that state suppression during pre-trial of BRADY / TUCCERI exculpatory evidence will not be countenanced. See COMMISSIONER OF PROBATION v. ADAMS, 65 Mass. App. Ct. 725, 731 (2006).

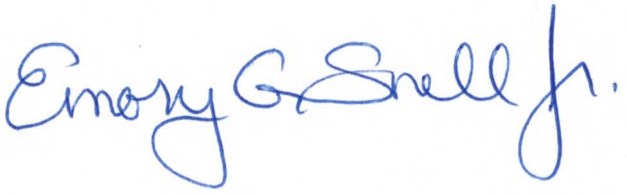
Unfortunately, the Defendant's Zane claim was not discovered for almost two decades and was delayed by the unprecedented government conduct in this case. Thereby, this Court should not be limited in any way by whether the Defendant filed, pressed, or lost post-conviction motions. Putting the burden on the Defendant would be inconsistent with the fundamental principle that the Commonwealth must bear the sanction for its violation of its BRADY / TUCCERI exculpatory evidence disclosure. See, e.g. LAVALLEE v. JUSTICES OF THE HAMPDEN SUPERIOR COURT, 442 Mass. 228, 246 (2004).

CONCLUSION

Wherefore, the Defendant has suffered irreparable injury due expressly to the prosecutor's / OCME's fraud on the Court, this most honorable Court must grant relief, as heretofore requested. Also the Court should exercise its authority under c.211, §3, and c.231 A, §1, to reserve and report this case to the full Court to vacate and dismiss with prejudice the Defendant's wrongful conviction, and for the entry of appropriate and declaratory and other relief. So Moved.

Signed this 14th day of July, 2018 under the pains and penalties of perjury.

Respectfully Submitted by the Defendant,



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Certificate of Service

I, Emory G. Snell Jr., on this day, did serve the attached on the following, in accord with 103 CMR 481.10 (2nd part) state paid indigent legal mail.

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